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No. 94-291

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GREGORY FREELAND, *et al.*,

Petitioners,

v.

HARLEY-DAVIDSON, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in summarily affirming the United States District Court for the Middle District of Pennsylvania's dismissal of the action, where the Respondent Union did not breach its duty of fair representation in negotiating resolutions to a backlog of more than 1500 grievances?

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COUNTER-STATEMENT OF THE CASE

A. OVERVIEW

The 29 Petitioners challenge grievance settlements entered into between their employer, Respondent Harley-Davidson, Inc. ("the Company"), and their Union, Respondent Tyson Lodge No. 175, District Lodge No. 98, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union") during the first

half of 1992. These settlements, which were approved overwhelmingly at Union membership meetings, resolved over 1,500 grievances arising out of three disputes – (1) an attendance policy implemented by the Company in 1991; (2) the Company's outsourcing (subcontracting) of bargaining unit work; and (3) the staffing of a new paint shop in the Company's York, Pennsylvania plant.

As a result of these settlements, the Company rescinded the disputed attendance policy; paid members of the bargaining unit a total of $363,720 to resolve the outsourcing grievances; offered 58 bargaining unit members (including 15 Petitioners) promotions to positions in the new paint shop, and paid an aggregate backpay total of $122,643 to bargaining unit members (including 3 Petitioners) improperly denied paint shop promotions.

Petitioners do not challenge the lower court's finding that the settlements were rational, nor do they offer any suggestion as to how the Union could have settled these grievances in a fashion that would have satisfied all 29 Petitioners. *See* A. 21 n.7.[1] Rather, Petitioners contend that because Union President Harry Smith, a bargaining unit member affected by the disputes, benefited from these settlements, Smith's participation in the settlement discussions constitutes *per se* bad faith.

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[1] The unpublished opinion of the United States District Court for the Middle District of Pennsylvania granting Respondents' Motions for Summary Judgment is reproduced in the appendix to Petitioners' Petition for Writ of Certiorari ("Cert. Petition") and referred to herein as "A. ——."

B. THE GRIEVANCE SETTLEMENTS

1. Background

The employments of approximately 1,600 workers at the York plant are governed by a collective bargaining agreement ("Agreement"). Under the Agreement, the Union's Grievance Committee has primary responsibility for resolving grievances. The Grievance Committee consists of three elected Union officials, all of whom are employed by the Company in the bargaining unit – the Union's president, vice-president, and chief shop steward.

By the end of 1991, there were over 1,500 grievances pending. Labor relations between the Company and Union were strained; the amicable resolution of disputes was at a virtual standstill. The resulting grievance backlog was extremely disruptive to plant operations and employee morale.

In January, 1992, new union officers (including Smith, the new President) took office. The Company and the Union immediately began negotiating to resolve the major issues comprising the extraordinary grievance backlog. Attendance grievances were resolved first, followed by outsourcing grievances, and then paint line grievances.

2. Attendance Policy Settlement

In July, 1991, the Company implemented a new attendance policy because it thought that the existing policy was too lenient. By the end of 1991, there were over 1,000 pending grievances concerning the attendance policy.

Setting the stage for the resolution of even thornier disputes by the parties, in February, 1992, the Company agreed to withdraw the new policy and reinstate the

predecessor attendance policy. It also agreed to rescind all disciplinary actions under the new policy (unless the actions would have occurred under the old policy), and make restitution to all affected employees. The settlement represented total satisfaction of the Union's demands, and it was approved by the Union's membership at a regularly scheduled membership meeting.

3. Outsourcing Grievance Settlements

Under the Agreement, the Company can outsource work which cannot be performed at the facility due to a lack of space, equipment, and available personnel, providing the Company provides the Union with adequate advance notice. By early 1992, there were over 200 pending grievances concerning Company outsourcing from 1989 through 1991.

In early 1992, at the Union's request, the Company spent over 200 hours investigating each outsourcing grievances to determine: (1) the work areas from which the work was outsourced; (2) the value of the outsourced work; (3) the reasons for the outsourcing; and (4) whether notice had been provided to the Union. A matrix of this information was prepared and submitted to the Union. (The Union also tested the accuracy of the Company's information.) To settle the grievances, the Union insisted that the Company pay backpay at overtime rates on grievances where the Company had provided no notice, or where the Company had been capable of performing the outsourced work.

The Company accepted the Union's positions, which resulted in an agreement to settle the outsourcing grievances for $363,720. Additionally, the Company agreed

to: clarify the outsourcing notice mechanism; create more full-time bargaining unit jobs; and examine the feasibility of a skilled trade apprentice program. After the outsourcing settlement was reduced to a March 13, 1992 letter of understanding, the settlement was approved by the Union's executive board, and by vote of the Union's members at a regularly scheduled Union meeting on March 26, 1992.

The Union agreed to distribute the $363,720 among the bargaining unit. The Union's Grievance Committee, and Union counsel devised a uniform formula to distribute the settlement monies based upon how much work was outsourced from the three areas (tool and die, maintenance, and production) affected by the grievances.

Based upon the distribution formula, each production employee, including all 29 Petitioners *and* Union President Smith, received a payment of $75. Employees in other areas received various amonts that were considerably greater than $75.

4. New Paint Shop Settlement

After the attendance and outsourcing grievances were settled, the Company and the Union next negotiated a settlement of the paint shop grievances. These grievances arose in 1991, when the Company opened a new paint shop using computerized robotic equipment and electrostatic painting, to replace its existing shop. To staff the new paint shop, the Company established three new job classifications: automated application technicians ("AATs"), finesse technicians ("finesse techs"), and preparation technicians ("prep techs").

The Company prepared job descriptions and minimum requirements for each position. AATs, who would

operate the robotic painting systems, had to have "one year class A production painting experience" to qualify; if qualified, the bidder also had to pass written and practical tests. Applicants for the finesse tech and prep tech position also had to pass written and practical tests.

The Company posted 29 AAT positions for bid in April, 1991; over 120 employees submitted bids. Of the applicants allowed to take the written test (i.e., those with "Class A" painting experience), more than 29 employees passed the test; AAT positions were then awarded, as required by the Agreement, to the 29 most senior qualified employees.

After the AAT positions were filled, numerous grievances were filed by individual bargaining unit members, challenging various aspects of how the Company awarded the new paint shop positions. For example, almost all Petitioners who were denied an AAT promotion challenged the written test. Other employees, including Harry Smith and Petitioner Dawson, filed grievances because they were not permitted to test after the Company denied that they had sufficient "Class A" experience.[2] In a 1991 general grievance, the Union also alleged that the one year Class A experience requirement, and the written testing requirement, violated the Agreement. Thus, even prior to Smith's election as President,

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[2]These employees contended that the "Class A" requirement, which was designed to insure that applicants had certain minimum painting skills, was arbitrary. Indeed, Smith worked on the Company's "bomb line" (painting shell casings), operating the very paint booth the Company used to give the practical test to the AAT applicants. Moreover, it is undisputed that many employees held the Class A position for more than one year, but never actually painted.

the Union argued that the AAT positions should have been awarded solely on the basis of seniority, that the written testing requirement was arbitrary, and that the class A experience requirement abritrarily excluded senior, qualified employees throughout the bargaining unit from the AAT position.

In April, 1992, the parties agreed to settle the new paint shop grievance by: (1) eliminating the written test for the new paint line positions; (2) modifying the AAT "one year class A production painting experience" requirement to "one year production painting experience": (3) eliminating some job duties from the paint line job description; (4) awarding 45 AAT positions (i.e., the 29 original positions and sixteen additional positions); (5) agreeing that the 45 positions would be filled from the original list of bidders for the AAT job; *and* (6) awarding full backpay to all eligible employees, in accordance with a uniform backpay formula.

In calculating backpay, only those employees who suffered actual economic harm as a result of improperly being denied an AAT position in 1991 (i.e., those who were entitled to one of the original 29 AAT positions) were eligible for backpay as part of the settlement ("backpay eligible"). Employees in the 16 new positions available for the first time as part of the settlement were not eligible for back pay because they lost no monetary opportunities due to a previous "denial".

As to backpay eligible employees, their backpay was calculated by comparing their earnings in the position(s) they held after they were denied an AAT job, with what their earnings would have been in the AAT job. An employee who would have earned more as an AAT received the difference as backpay.

Consistent with the parties' long standing practice in promotion cases, refused overtime opportunities were considered as income for purposes of calculating backpay. (For example, if an employee actually earned $20,000, but refused $5,000 in overtime, the employee's total earnings were $25,000 for the purposes of calculating settlement backpay.) Similarly, the earnings of the AATs were increased by the amount of overtime the AATs refused.

After unanimous approval by the Union's Executive Board, the paint line settlement was overwhelmingly approved at a regularly scheduled Union membership meeting held on April 23, 1992. Contrary to Petitioners' unsupported assertions, *see* Cert. Petition at 10, the use of refused overtime in the backpay calculation was described at this meeting, a fact admitted by Petitioner King.

Thereafter, using this formula, the Company made payments to 8 senior, eligible employees who were awarded AAT positions. This group included Union President Smith, who received $18,241.87 (the second highest payment), and several Petitioners. *See* A. 22.

Numerous other Petitioners received AAT positions without backpay. In this regard, the old paint shop, where most Petitioners worked, had almost unlimited overtime opportunities, given the Company's needs during the transition to the new paint shop. Therefore, most of the Petitioners suffered little or no economic loss as a result of being denied the AAT job. Smith, however, worked in a part of the plant that had little overtime available, and thereby suffered substantially more economic loss.[3]

[3] Petitioners contend that Smith should have disclosed the amount of his backpay recovery at the April, 1992 Union meet- [footnote continued]

The Company used the same backpay formula for the finesse tech and prep tech positions. Using the original bid list, the Company promoted nine Petitioners to finesse tech, with or without backpay. Only Petitioners Smallwood and Ramos raised issues associated with the prep tech position; both were offered prep tech positions as part of the paint line settlement.

The Company considered the paint line settlement to be virtually complete capitulation. Indeed, the Company believed that the only concession it "won" in the settlement was the Union's agreement to fill AAT jobs from the original bid list, rather than having all the jobs posted for new bids. (This agreement was needed to avoid replacement of trained AATs, which would have made the paint line inoperable, and shut down the entire York plant.) Even so, the disruption in implementing the settlement was so minimal that only two AATs were reassigned to other jobs. These were two employees (Petitioners Haines and Elliot) who were awarded AAT jobs in the original bidding but who, under the settlement, were not among the 45 most senior qualified employees on the original bid list. Because Haines and Elliott did not have sufficient seniority, they were reassigned to other positions, consistent with the Agreement.

From the Union's perspective, the settlements accomplished every objective the Union had set out to achieve when it filed the grievances, without the time, risk or expense of arbitration. Indeed, given the District

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ing. In fact, neither the Company nor Union vice-President Gordon Spangler (who had been designated by the Union to review the Company's backpay calculations) disclosed individual backpay amounts to Smith or any other affected employee until after the Union membership meeting on April 23, 1992. *See* A. 21-22.

Court's finding, unchallenged by Petitioners, that the written test requirement did not violate the Agreement, *see* A. 26-28, many Petitioners received promotional opportunities from the settlement that may not have been attained in arbitration. Finally, and perhaps most important, the Company and the Union succeeded in resuscitating the labor-management relationship at Harley-Davidson, the stagnation of which had literally threatened to paralyze the York operation.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari fails to raise any novel or important issue of federal law which necessitates the exercise of this Court's discretionary jurisdiction. Further, the District Court properly dismissed this action below, because Petitioners failed to prove that the Union violated its duty of fair representation in negotiating the resolution to more than 1500 pending grievances. The grievance settlements were necessary, fair and rational resolutions of contentious issues that threatened both plant operation and labor-management relations. Moreover, the Union's elected officers, who are themselves working bargaining unit members, discharged their representation duties in complete good faith by negotiating the grievance settlements, which were subsequently approved by the Union's membership.

ARGUMENT

REASONS FOR DENIAL OF WRIT OF CERTIORARI

The summary affirmance by the Third Circuit Court of Appeals of the District Court's grant of summary judgment to Respondents conflicts with neither the decisions of this Court, nor the decision of any other

court of appeals. Nor does this case raise any novel or important issues of federal law which need be settled by this Court. Rather, Petitioners merely entreat this Court to introduce disruption and upheaval to industrial relations, in place of the certitide and stability which have long propelled federal labor law.

The District Court below correctly applied the standard for evaluating a union's representation of its bargaining unit members that this Court first enunciated almost thirty years ago in *Vaca v. Sipes,* 386 U.S. 171, 190, 87 S.Ct. 903, 916 (1967): A union breaches its duty of fair representation only if its actions are "arbitrary, discriminatory, or in bad faith."[4] As this Court elaborated in *Airline Pilots Association v. O'Neill,* 409 U.S. 65, 111 S.Ct. 1127 (1991), whether a union has acted arbitrarily calls for an objective evaluation of whether, "in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a 'wide range of reasonableness,' . . . as to be irrational." 499 U.S. at ___ , 111 S.Ct. at 1130 (citation omitted).

It is axiomatic that a claim that a union has acted in "bad faith" must be *proven* by the party challenging the Union's conduct. *Ackley v. Local Union 337, Team-*

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[4]Preliminary, although the Union resolved over fifteen hundred grievances in several contentious areas, Petitioners appear to request that this Court review only the settlement of the Paint Shop grievances. However, Petitioners do not challenge the District Court's finding that the Company did not breach the Agreement in imposing a written testing requirement. As such, Petitioners have failed to prove one of the two essential elements of a hybrid duty of fair representation case. *See Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 164-65, 103 S.Ct. 2281, 2290-91 (1983). Under these circumstances, the instant case was properly dismissed, regardless of the propriety of the Union's conduct.

sters, 910 F.2d 1295, 1307-08 (1990) (Nelson, J., dissenting), *rev'd,* 948 F.2d 267 (6th Cir. 1991) (adopting reasoning of dissenting opinion of Nelson, J., in light of *O'Neill*); *Schmidt v. IBEW, Local 949,* 980 F.2d 1167, 1171 (8th Cir. 1992). In the instant case, the District Court firmly rejected Petitioners' contention that the Union "designed" the settlement of the Paint Shop grievances to benefit Union President Smith, at the expense of other bargaining unit members:

> [Petitioners] imply that the [Paint Shop backpay] equation was established to insure that Harry Smith received a large sum. We note, first, that there is no indication in the record that [Petitioners'] accusation is true.

A. 22. The District Court further found that this allegation, like others leveled by Petitioners against the Union, was based upon Petitioners' "attempt to draw inferences from the discovery produced in this case that reason and logic dictate are untenable." A. 22-23, 35.

Having failed to prove either that the settlements were unreasonable, or that the Union acted in bad faith, Petitioners now argue that this Court should rewrite the face of federal labor relations, and find that union officials are subject to conflict of interest principles applicable to common law trust fiduciaries. *See* Cert. Petition at 14.

The theory that union officials acting in their elected, *representative* capacity must, as a matter of law, disqualify themselves, or otherwise obtain the "consent"of individual bargaining unit members, whenever they have some arguable interest in the outcome of a grievance is absurd and without any foundation in federal law.

Beyond a doubt, such a requirement would decimate industrial self-government, which is the underlying purpose of unionization. As the Ninth Circuit recognized in *Barthelemy v. Air Line Pilots Association,* 897 F.2d 999, 1005 (9th Cir. 1990), "a primary purpose of having elected union officials is to make sure their personal interests align with those of other members." Thus, unlike a common law fiduciary, a union official is believed to be a more effective representative when he or she is personally affected by the outcome of grievances.

Moreover, unions are often faced reconciling the conflicting claims of bargaining unit members. Under such circumstances, this Court has admonished against "neutraliz[ing]" unions when "the issue is chiefly between two sets of employees." *Humphrey v. Moore,* 375 U.S. 335, 349-50, 84 S.Ct. 363, 372 (1964); *see also Ratkosky v. United Transportation Union,* 843 F.2d 869, 878-79 (6th Cir. 1988) (minority group adversely affected by union action does not establish hostility); *Berrigan v. Greyhound Lines, Inc.,* 782 F.2d 295, 298 (1st Cir. 1986) (employees cannot insist that the union ignore the legitimate interests of other members).

In this case, the Petitioners themselves present conflicting claims, where resolution in favor of some would work against others. *See* A. 21 n.7. Not surprisingly, Petitioners do not explain how the Union's officials should have sought "consent" from the bargaining unit to discharge their duties, or from whom such "consent" should have been sought.

In fact, under federal law, the "consent" for the Union's officers to discharge their duties under the Union's by-laws is given by ballot, when the membership as a whole elect its representatives. Petitioners

now in effect contend that they should have "veto" power over the representation functions of the Union's elected officers in resolving grievances, notwithstanding the mandate of the membership as a whole. It is hard to posit a requirement that would be more disruptive to stable industrial relations than a union's president, on a case-by-case basis, needing to seek the permission of various factions within a bargaining unit to resolve a dispute, simply because the representative's employment as a bargaining unit member is also affected.

Indeed, contrary to Petitioners' claim, this case does not even present an actual conflict of interest between the Union President and Petitioners. As Petitioners concede, to prevail on their grievances, and for Smith to obtain a position based on seniority, the written testing requirement had to be eliminated. Thus, not only did Petitioners' interests "align" with Smith's, *see Barthelemy,* 897 F.2d at 1005, Petitioners benefited when the Union successfully negotiated elimination of the test requirement. Similarly, Smith's interest in modifying the "Class A" experience requirement, which several Petitioners acknowledge to be irrational, mirrored that of Petitioner Dawson, as well as many other individuals throughout the bargaining unit who were arbitrarily excluded from qualifying for the AAT position.

Finally, although Petitioners complain that they should have received more money from the paint line settlement, because "refused overtime" should not have been a factor in backpay calculations, there is not a scintilla of credible evidence to dispute the fact that "refused overtime" is always a variable in promotional backpay determinations. Likewise, Petitioners articulate no basis whatsoever for how this use of refused overtime violates the Agreement. Indeed, there was no

resolution to the paint line dispute that could have been more equitably implemented, vis-a-vis 120 employees who sought the 29 AAT jobs.

It is well established that federal courts do not sit to "second guess" the outcomes of employer-union negotiations. *Peterson v. Kennedy,* 771 F.2d 1244, 1254 (9th Cir. 1985) ("[i]t is for the union, not the courts, to decide whether and in what manner a particular grievance should be pursued"). Indeed, the federal courts have correctly expressed concern that needless and protracted lawsuits such as this over union's good faith grievance resolutions may "drive some unions out of existence or otherwise damage the collective bargaining process." *Ackley,* 910 F.2d at 1308; *see also Herring v. Delta Air Lines, Inc.,* 894 F.2d 1020, 1023 (9th Cir.), *cert. denied,* 494 U.S. 1016, 110 S.Ct. 1319 (1990) (union "must be able to focus on the needs of its whole membership without undue fear of law suits from individual members").

The Courts below properly rejected Petitioners' desire to elevate their self interests over Federal law and their bargaining unit as a whole. The District Court's dismissal of Petitioners' claims fully conforms with the prior decisions of this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Wherefore, the Respondent Union requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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